



Same Sex Marriage and Constitutional Law: A Comparative Analysis

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Abstract— This paper examines the constitutional dimensions of same-sex marriage in India through a comparative and rights-based lens. It analyses marriage as a civil institution governed by constitutional values of equality, dignity, liberty, privacy, and autonomy. Drawing upon Indian constitutional jurisprudence, the study traces the progressive recognition of LGBTQIA+ rights and evaluates recent judicial responses to claims for marriage equality. While courts have affirmed the constitutional legitimacy of same-sex relationships, they have exercised restraint in redefining marriage, emphasising separation of powers and legislative competence. The paper also situates the Indian debate within global constitutional developments, highlighting evolving notions of constitutional morality and expanding understandings of family and marriage in comparative jurisdictions. It further explores the social, legal, and economic consequences of non-recognition, particularly in relation to family life, inheritance, and social security. The paper concludes that a dialogic constitutional approach—where courts protect fundamental rights and legislatures institutionalise reform—offers the most sustainable path for harmonising constitutional principles with social realities and ensuring equal citizenship for sexual minorities.



Keywords— Same Sex Marriage, LGBTQIA+, Equality, Constitutional Values.

I. INTRODUCTION

Marriage has long been regarded as a foundational social institution through which the state regulates intimate relationships, family life, inheritance, and social security. Traditionally, marriage laws across jurisdictions were structured around heterosexual unions, reflecting dominant social, religious, and cultural norms. However, with growing recognition of sexual orientation as an inherent aspect of individual identity, same-sex marriage has emerged as a central issue in constitutional and human rights discourse. The demand for legal recognition of same-sex marriage is not merely about ceremonial acknowledgement but about equal access to a wide range of legal rights and protections that flow from marital status, including succession, adoption, medical decision-making, taxation benefits, and social welfare (Eskridge, 1996).

Globally, the movement for marriage equality has been driven by broader struggles for LGBTQIA+ rights and

social inclusion. Several constitutional democracies have either judicially or legislatively recognised same-sex marriage, treating it as an extension of equality and non-discrimination principles. In contrast, many states continue to deny such recognition, often invoking tradition, religion, or legislative prerogative. This divergence makes same-sex marriage a significant constitutional question, as it tests the capacity of constitutions to adapt to evolving social realities while remaining anchored in fundamental rights and democratic values (Waldijk, 2017).

In India, the debate gained prominence following the decriminalisation of consensual same-sex relations, which marked a decisive shift in constitutional interpretation towards dignity, autonomy, and privacy. The subsequent demand for marriage equality has raised complex constitutional questions regarding the scope of fundamental rights, the limits of judicial intervention, and the role of the legislature in redefining social institutions. Thus, same-sex marriage occupies a critical position in contemporary constitutional law, situated at the

intersection of personal liberty, equality, and state regulation of family life.

Marriage, Equality, and Constitutional Values

Constitutional values such as equality, liberty, dignity, and non-discrimination form the normative foundation of modern constitutional democracies. Marriage, though traditionally regulated by personal and statutory laws, is not immune from constitutional scrutiny. When access to marriage is restricted based on sexual orientation, it raises serious concerns under the equality principle, as similarly situated individuals are treated differently without a compelling constitutional justification (Sunstein, 2014).

Equality in constitutional law extends beyond formal equal treatment to include substantive equality, which requires the state to address structural disadvantages faced by marginalised groups. Denial of marriage rights to same-sex couples perpetuates social stigma and reinforces historical patterns of exclusion. From a constitutional perspective, such exclusion undermines the guarantee of equal protection of laws by privileging heterosexual relationships over same-sex relationships solely based on sexual orientation (Fredman, 2016). This unequal treatment has tangible consequences, depriving same-sex couples of legal security and social recognition.

Closely linked to equality is the constitutional value of dignity. Marriage is not merely a legal contract but a socially meaningful institution that affirms personal identity and emotional bonds. Excluding same-sex couples from marriage communicates a message of inferiority, suggesting that their relationships are less worthy of respect and protection. Constitutional courts across jurisdictions have increasingly recognised that dignity is compromised when the state denies individuals the freedom to choose their life partners and to have their relationships equally recognised by law (Barak, 2015).

Autonomy and personal liberty further strengthen the constitutional case for marriage equality. The choice of a partner and the decision to enter into a committed relationship fall within the private sphere of individual life, protected against unwarranted state interference. Constitutional jurisprudence has increasingly emphasised that intimate decisions concerning love, companionship, and family life are central to individual self-development. Restrictions on same-sex marriage, therefore, raise questions about the legitimacy of state control over deeply personal choices (Klare, 1998).

At the same time, constitutional debates on same-sex marriage also engage concerns about institutional competence and democratic legitimacy. Critics argue that redefining marriage involves complex social and policy considerations better left to legislatures. Supporters

counter that when legislative inaction results in the continued denial of fundamental rights, constitutional courts have a duty to intervene to protect minorities against majoritarian exclusion. This tension between constitutional morality and social morality remains a defining feature of same-sex marriage litigation worldwide.

II. REVIEW OF LITERATURE

William N. Eskridge's (1996) work is widely cited for reframing same-sex marriage as a question of sexual liberty, equal citizenship, and state recognition of committed relationships rather than cultural "permission." He combines constitutional argument with historical and comparative material to show that relationship recognition has taken different legal forms across societies, and that modern exclusionary marriage regimes often reflect recent legal choices rather than timeless tradition. Eskridge's framing is especially useful for constitutional analysis because it connects marriage to status, dignity, and state-distributed benefits, demonstrating how denial of marriage operates as a structural inequality. This scholarship is often used to support the idea that constitutional adjudication can legitimately intervene when a class of persons is denied equal access to a fundamental civil institution.

Chaudhary's article on *Navej Singh Johar v. Union of India* (2019) explains how the Supreme Court's reasoning strengthened constitutional protection for LGBTQ+ persons through the principles of autonomy, dignity, and equality. It highlights the Court's use of "love" and relational freedom as part of constitutional meaning-making. The literature is significant for the same-sex marriage debate in India because it shows how post-*Navej* constitutional doctrine (privacy, dignity, non-discrimination, and anti-stereotyping) can logically support claims for relationship recognition and equal civic status. The article also helps clarify a recurring comparative theme: courts often begin with decriminalisation and anti-discrimination, and later confront whether constitutional values require positive legal recognition (such as marriage or civil unions).

Objectives:

- i. To analyse the judicial approach of Indian courts towards LGBTQIA+ rights and marriage equality.
- ii. To compare Indian constitutional developments with global trends in the recognition of same-sex marriage.

Conceptual Framework of Marriage and Sexual Orientation

Evolution of the Concept of Marriage

Marriage has historically been understood as a socially sanctioned institution structured around procreation, lineage, and property relations. In many legal systems, it evolved from a patriarchal arrangement into a civil status regulated by the state, conferring rights and obligations concerning inheritance, maintenance, legitimacy, and social security. Over time, constitutional democracies have increasingly reconceptualised marriage as a voluntary partnership grounded in consent, companionship, and mutual support, rather than a rigidly defined biological or gendered arrangement. This evolution reflects broader shifts in constitutional thought, where individual autonomy and equality have gained prominence over tradition-based justifications. Contemporary constitutional discourse views marriage as a site where personal liberty and state regulation intersect, rendering it subject to scrutiny under equality and non-discrimination principles, rather than immune as a purely private or cultural institution (Eskridge, 1996).

Sexual Orientation, Identity, and Legal Recognition

Sexual orientation is now widely recognised as an inherent and deeply personal aspect of human identity, shaping emotional bonds, intimacy, and family life. Legal systems that deny recognition to same-sex relationships often do so by privileging heterosexual norms, thereby marginalising sexual minorities. Constitutional and human rights jurisprudence increasingly affirms that sexual orientation falls within protected categories under equality and dignity-based frameworks. Legal recognition of relationships, including marriage or analogous institutions, plays a crucial role in affirming social legitimacy and safeguarding material rights. The absence of such recognition reinforces stigma and perpetuates structural inequality, even where same-sex conduct is decriminalised. Modern constitutional thought, therefore, emphasises that recognition is not symbolic alone, but essential to ensuring equal citizenship and access to state-conferred benefits (Fredman, 2016; Waaldijk, 2017). Within this framework, marriage equality is understood as part of the broader constitutional obligation to respect identity, autonomy, and equal moral worth.

Constitutional Foundations of Same-Sex Marriage

The constitutional justification for same-sex marriage flows from a rights-centred understanding of the Constitution as a living instrument designed to protect minorities against exclusionary social practices. At its core lies the principle of equality, which prohibits the state from conferring benefits on one class of citizens while denying them to another without compelling justification. Marriage is a legal status through which the state allocates a wide range of rights and protections. When access to this

institution is restricted based on sexual orientation, the resulting classification entrenches disadvantage and reinforces historically rooted patterns of marginalisation. From a constitutional perspective, such exclusion conflicts with the commitment to substantive equality and equal protection of the laws (Fredman, 2016).

Closely connected to the concept of equality is the constitutional value of dignity. Dignity requires recognition of individuals as autonomous moral agents capable of forming meaningful personal relationships. Denial of marital recognition to same-sex couples does not merely withhold legal benefits; it symbolically devalues their relationships and identities. Constitutional theory increasingly treats dignity as incompatible with state actions that label certain forms of intimacy as inferior or unworthy of social respect and consideration. Equal access to marriage, therefore, becomes a mechanism through which the Constitution affirms the equal worth of diverse forms of family life (Barak, 2015).

The principles of privacy and autonomy further strengthen this foundation. Intimate relationships, choices of companionship, and decisions about family formation fall within a protected private sphere where individual self-determination prevails over collective moral preferences. Constitutional protection of privacy extends to decisional autonomy, limiting the state's authority to regulate consensual adult relationships. Excluding same-sex couples from marriage intrudes into this private domain by constraining their ability to formalise and secure their partnerships on equal terms. Viewed together, equality, dignity, privacy, and autonomy construct a coherent constitutional basis for recognising same-sex marriage as an aspect of equal citizenship rather than a discretionary social reform.

Same-Sex Marriage under the Indian Constitutional Framework

- i. The constitutional debate on same-sex marriage in India is primarily anchored in Articles 14, 15, 19, and 21 of the Constitution of India, which collectively guarantee equality, non-discrimination, freedom, and personal liberty. Article 14 mandates equality before the law and prohibits arbitrary state action. Excluding same-sex couples from marriage creates a classification based on sexual orientation that lacks a reasonable nexus with any legitimate state objective. Article 15, which forbids discrimination on grounds of sex, has been judicially interpreted to include sexual orientation, thereby strengthening constitutional protection against indirect exclusion of LGBTQ+

persons. Article 21 further expands this framework by protecting dignity, autonomy, and the freedom to choose one's partner, recognising intimate decision-making as central to personal liberty. Together, these provisions establish a constitutional environment that is receptive to claims of marriage equality, even in the absence of explicit textual recognition.

- ii. Despite this constitutional foundation, the statutory framework governing marriage in India remains heteronormative. Major marriage laws—including the Hindu Marriage Act, 1955; Special Marriage Act, 1954; Indian Christian Marriage Act, 1872; and Muslim personal law—are structured around the binary understanding of marriage as a union between a “man” and a “woman.” The Special Marriage Act, though secular in nature, continues to employ gender-specific terminology, thereby excluding same-sex couples from its ambit. As a result, while same-sex relationships have received constitutional recognition in terms of privacy and dignity, they remain outside the formal legal institution of marriage.

Judicial Approach in India

Progressive Recognition of LGBTQIA+ Rights

The Indian judiciary has played a transformative role in advancing LGBTQIA+ rights through a rights-centric interpretation of the Constitution. A decisive shift occurred with the recognition that sexual orientation and gender identity are intrinsic to individual dignity and autonomy protected under **Article 21**. Earlier decisions laid the groundwork by affirming the right to privacy and decisional autonomy in intimate matters, thereby limiting the reach of state control over consensual adult relationships. This jurisprudential evolution culminated in the decriminalisation of same-sex relations, where the Supreme Court held that constitutional morality must prevail over social morality. The Court explicitly recognised LGBTQIA+ persons as equal citizens entitled to constitutional protection against discrimination under **Articles 14 and 15**, marking a significant departure from earlier exclusionary approaches.

Recent Constitutional Adjudication on Marriage Equality

The question of marriage equality reached the constitutional stage in **Supriyo @ Supriya Chakraborty v. Union of India (2023)**, where petitioners sought legal recognition of same-sex marriages under existing marriage statutes, particularly the Special Marriage Act, 1954. While the Supreme Court declined to read marriage equality into statutory law, citing separation of powers and

legislative competence, it reaffirmed several critical constitutional principles. The Court unanimously acknowledged that same-sex couples have a **constitutionally protected right to cohabit**, form relationships, and enjoy dignity and autonomy under Article 21. It also recognised systemic discrimination faced by queer couples and emphasised the state's obligation to prevent harassment and exclusion.

Although the judgment stopped short of recognising a fundamental right to marry, it reinforced the constitutional legitimacy of same-sex relationships. It signalled that denial of broader legal recognition raises serious equality concerns. The decision thus reflects a cautious but progressive judicial approach—one that consolidates LGBTQIA+ rights within constitutional doctrine while deferring the formal redefinition of marriage to the legislature.

Equality-Based and Dignity-Based Arguments

Arguments in favour of constitutional recognition of same-sex marriage are grounded in the principles of **equality, dignity, and personal liberty**. Proponents contend that marriage is a civil institution through which the state distributes legal rights and social benefits; denying access to it based on sexual orientation violates **Article 14** by creating an unreasonable and exclusionary classification. Such exclusion also amounts to indirect discrimination under **Article 15**, as it disproportionately disadvantages LGBTQIA+ persons. From a dignity-based perspective, marriage recognition affirms the equal moral worth of individuals and their relationships, thereby upholding the dignity of both. Constitutional jurisprudence has repeatedly emphasised that dignity is compromised when the state treats specific identities or forms of intimacy as inferior. Recognition of same-sex marriage is therefore viewed as a means of securing **equal citizenship** and protecting intimate choice under **Article 21** (Navtej Singh Johar v. Union of India, 2018; Barak, 2015).

Cultural, Religious, and Institutional Concerns

Opposition to constitutional recognition is often rooted in **cultural and religious traditions** that define marriage as a heterosexual institution oriented towards procreation. Critics argue that altering this definition may disrupt long-standing social norms and religious practices protected under **Articles 25 and 26 of the Constitution**. Institutional concerns also feature prominently, particularly the argument that redefining marriage involves complex policy choices better addressed by the legislature rather than the judiciary. Courts are cautioned against overstepping their constitutional role and engaging in social reform without democratic deliberation. Additionally, it is argued that constitutional recognition

could have cascading effects on personal laws, adoption, and succession frameworks, requiring comprehensive legislative restructuring.

Limits of Judicial Review and Role of the Legislature

1. Separation of Powers Debate

- i. The doctrine of separation of powers requires that law-making, interpretation, and execution remain institutionally distinct to preserve constitutional balance. Courts are empowered to interpret the Constitution, but are traditionally cautious in rewriting statutes or creating new social institutions.
- ii. In the context of same-sex marriage, the Supreme Court of India has acknowledged that while fundamental rights may evolve, altering the legal definition of marriage—which affects multiple statutory regimes—raises concerns of judicial overreach.
- iii. In *Supriyo @ Supriya Chakraborty v. Union of India*, the Court declined to read gender-neutral terms into the Special Marriage Act, emphasising that such an exercise would amount to legislative substitution, not interpretation.
- iv. This approach reflects judicial restraint, where courts protect constitutional rights but avoid assuming the role of Parliament in matters involving wide-ranging social and legal consequences.

2. Institutional Competence and Democratic Legitimacy

- i. Legislatures are considered institutionally better equipped to handle complex policy reform, as they can conduct consultations, assess social impact, and design comprehensive frameworks.
- ii. Marriage laws intersect with adoption, succession, taxation, and personal laws, requiring coordinated statutory amendments that courts may lack the tools to implement effectively.
- iii. Democratic legitimacy is another concern: legislative action carries the authority of popular representation, whereas judicial decisions risk being perceived as imposed reforms, especially on culturally sensitive issues.
- iv. Comparative examples illustrate this distinction. In the United Kingdom, same-sex marriage was legalised through the Marriage (Same Sex Couples) Act 2013, following parliamentary debate rather than judicial mandate.
- v. However, constitutional theory also recognises that legislative inaction cannot justify the

continued denial of fundamental rights. Courts, therefore, play a crucial role in identifying constitutional violations, even when remedial action is deferred to the legislature.

Impact of Non-Recognition on LGBTQIA+ Rights

1. Social Consequences

- i. Non-recognition of same-sex relationships reinforces social stigma and invisibility, signalling that queer relationships are less legitimate than heterosexual ones.
- ii. Absence of legal status weakens social acceptance within families, workplaces, and communities, often leading to exclusion, harassment, or forced concealment of identity.
- iii. In *Navtej Singh Johar v. Union of India*, the Supreme Court acknowledged that stigma and discrimination persist even after decriminalisation, highlighting that social equality requires more than mere tolerance.

2. Legal Consequences

- i. Without formal recognition, same-sex couples lack access to basic family law protections, such as joint adoption, spousal consent in medical emergencies, and protection against separation-related vulnerabilities.
- ii. Courts have recognised the right to cohabit, but non-recognition means relationships remain legally fragile and dependent on discretionary protections rather than enforceable rights.
- iii. The decision in *Supriyo @ Supriya Chakraborty v. Union of India* reaffirmed dignity and autonomy but left same-sex couples outside statutory marriage frameworks, resulting in a rights gap.

3. Economic Consequences

- i. Marriage serves as a gateway to economic security through pensions, insurance, tax benefits, and employment-related family entitlements.
- ii. Same-sex partners are routinely excluded from nomination benefits, compassionate appointments, and spousal pensions, increasing long-term financial insecurity.
- iii. Lack of inheritance rights forces couples to rely on wills, which remain vulnerable to legal challenge by biological families.

4. Access to Family, Inheritance, and Social Security Rights

- i. Non-recognition prevents automatic succession and maintenance rights, denying partners protection under personal and secular laws.
- ii. Social welfare schemes tied to marital status exclude queer couples, undermining the constitutional promise of equal citizenship.
- iii. International human rights bodies have stressed that the absence of relationship recognition results in systemic inequality, even where private conduct is lawful (*Toonen v. Australia*, 1994).

Emerging Trends and Global Constitutional Developments

1. Shifting Constitutional Morality

- i. Constitutional systems across the world are increasingly embracing constitutional morality over social morality, especially in matters concerning minority rights. Courts have moved away from tradition-based reasoning towards interpretations grounded in dignity, autonomy, and equality.
- ii. In India, the idea of constitutional morality has been used to protect individual freedoms against majoritarian prejudice, particularly in cases involving sexuality and personal identity. This approach recognises that constitutions are transformative documents, intended to guide societies toward inclusiveness rather than merely reflect existing norms.
- iii. A comparable shift is evident in South Africa, where the Constitutional Court in *Minister of Home Affairs v. Fourie* held that constitutional guarantees of equality and dignity required the state to recognise same-sex marriage, even if public opinion was divided.
- iv. Similarly, constitutional courts in Europe and the Americas increasingly treat sexual orientation as a protected characteristic, requiring heightened scrutiny of exclusionary laws.

2. Expanding Scope of Family and Marriage Laws

- i. Globally, the concept of family has expanded beyond the heterosexual nuclear model to include same-sex couples, single-parent households, and non-traditional partnerships. This evolution reflects the changing social realities and evolving understandings of intimacy and care.
- ii. In the United States, *Obergefell v. Hodges* constitutionalised same-sex marriage by recognising that exclusion from marriage denies equal dignity and access to social institutions. The

judgment emphasised that marriage laws must evolve in tandem with constitutional values.

- iii. Several jurisdictions have adopted gender-neutral marriage statutes through legislation, such as Canada and Germany, demonstrating a preference for democratic reform alongside constitutional commitments.
- iv. Even where marriage equality has not been fully recognised, courts have required states to provide alternative legal frameworks. The European Court of Human Rights, in *Oliari v. Italy* (2015), held that states have a positive obligation to ensure legal recognition and protection for same-sex couples under the right to family life.
- v. These developments indicate a global trend toward functional recognition of families, focusing on stability, mutual support, and care rather than gender composition.

3. Overall Trend

- i. The emerging global consensus suggests that constitutional law is gradually redefining marriage as a rights-bearing civil institution, not a fixed cultural construct.
- ii. This trend underscores a broader movement toward inclusive constitutionalism, where evolving social understandings inform the interpretation of fundamental rights while preserving democratic legitimacy.

Way Forward for Constitutional Governance

A sustainable way forward on same-sex relationship recognition in India requires a careful balance between constitutional mandates and democratic processes. While courts play a crucial role in interpreting and enforcing fundamental rights, long-term and comprehensive reform of marriage law is best achieved through legislative action. Parliament, as the primary law-making body, is institutionally equipped to examine the social, legal, and administrative implications of reform. Amendments to the Special Marriage Act, 1954, particularly the adoption of gender-neutral language, would provide a secular and inclusive framework for relationship recognition without interfering with religious personal laws. Legislative deliberation also allows for public consultation, which can help reduce resistance rooted in misinformation or cultural anxiety.

At the same time, the judiciary remains a vital constitutional actor in protecting LGBTQIA+ persons from discrimination and exclusion. Recent constitutional adjudication demonstrates that even where courts decline to mandate marriage equality, they continue to affirm

dignity, privacy, and the right to cohabit as integral components of Article 21. Through incremental judicial interventions—such as expanding access to partner-based welfare benefits, enforcing non-discrimination in employment and housing, and preventing harassment—courts can ensure that constitutional guarantees are not rendered illusory. This dialogic role respects the doctrine of separation of powers while keeping constitutional values alive in everyday governance.

Harmonising constitutional values with social realities requires recognising that constitutional morality is not static, nor is it contingent on immediate social consensus. The Constitution envisions gradual social transformation guided by principles of equality, dignity, and autonomy. Law has historically played a formative role in shaping social attitudes, whether in relation to caste, gender, or personal liberty. Civil recognition of same-sex relationships does not compel social or religious endorsement; it merely ensures that the state does not deny equal protection and legal security to a vulnerable minority.

Ultimately, constitutional governance must proceed through a cooperative institutional approach, where courts articulate rights, legislatures institutionalise reform, and society evolves alongside constitutional ideals. Such an approach preserves democratic legitimacy while affirming the Constitution's transformative promise of inclusion and equal citizenship for all.

III. CONCLUSION

The constitutional debate on same-sex marriage in India reflects a broader struggle to reconcile individual rights with institutional structures, social diversity, and democratic legitimacy. As this paper has shown, marriage is no longer understood merely as a traditional or religious institution, but as a civil status through which the state allocates legal recognition, dignity, and material benefits. Denial of access to this institution based on sexual orientation raises serious constitutional concerns under the principles of equality, non-discrimination, dignity, privacy, and personal liberty.

Indian constitutional jurisprudence has undergone a significant transformation over the past decade, progressively affirming the rights of LGBTQIA+ persons as equal citizens. Courts have recognised sexual orientation and identity as integral to human dignity and autonomy, and have rejected the use of social morality to justify constitutional exclusion. However, recent adjudication on marriage equality demonstrates judicial caution, grounded in respect for separation of powers and institutional competence. While the judiciary has

consolidated constitutional protection for same-sex relationships, it has refrained from reconfiguring the statutory framework of marriage, thereby placing responsibility on the legislature.

Comparative constitutional developments indicate a global shift towards inclusive understandings of family and marriage, achieved through both judicial intervention and democratic law-making. These experiences underline that constitutional recognition need not undermine cultural pluralism, but can coexist with it by confining reform to the secular domain of civil law. Ultimately, the Indian Constitution's transformative vision requires that constitutional morality guide governance, even as social consensus evolves. A collaborative approach—where courts safeguard rights, legislatures enact inclusive frameworks, and society adapts over time—offers the most legitimate and sustainable path forward. Recognition of same-sex relationships is thus not merely a legal reform, but a reaffirmation of the Constitution's promise of equal dignity and citizenship for all.

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